No. 523.

Br. of Lancaster for Appellee

Office Supreme Court U.S.
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JAMES H. McKENNEY,
Clerk.

Filed Mar. 21, 1902.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 523.

THE UNITED STATES, Appellant,

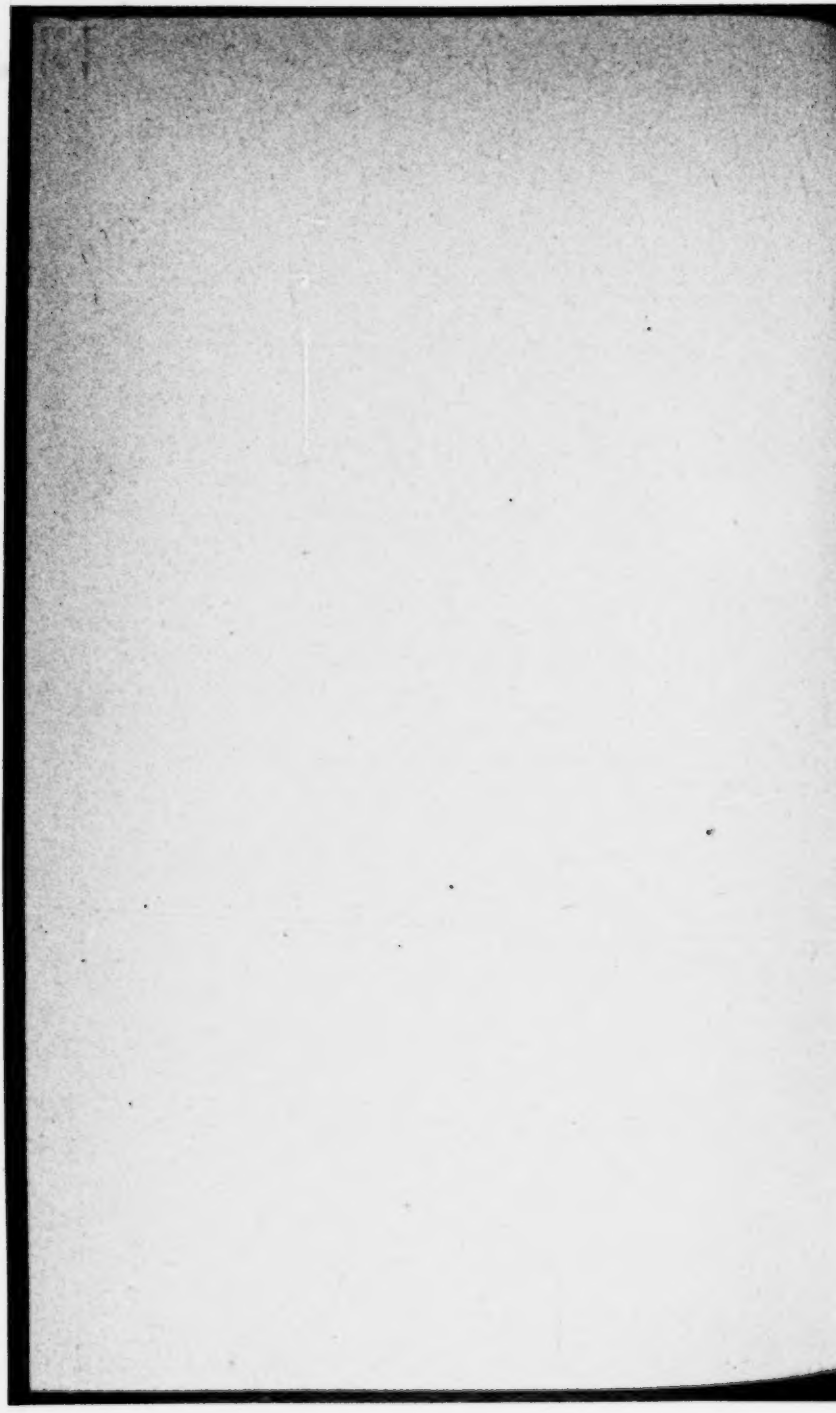
vs.

JOSEPH C. FINNELL, Appellee.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

CHARLES C. LANCASTER,
Counsel for Appellee.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES, Appellant,
vs.
JOSEPH C. FINNELL, Appellee. } No. 523.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

STATEMENT OF FACTS.

This is an appeal from a judgment of the Court of Claims in favor of the claimant, the appellee. The Court found the following facts:

I.

The claimant, Joseph C. Finnell, was clerk of the District and Circuit Courts of the United States for the District of Kentucky from July 1, 1894, to June 30, 1898, duly qualified and acting.

II.

During said period he entered orders, decrees and other proceedings of the court on 199 days, extending through said time. None of the judges of said courts were personally present at the time of the entry of such orders, decrees and proceedings, but said orders, decrees and proceedings were transmitted to the claimant by mail by the different judges composing the courts of said district. Said orders, decrees and proceedings were endorsed: "Enter this order" (signed by the judge); or, "Enter this" (signed by the judge); or,

"Enter" (signed by the judge). For the purpose of entering said orders, decrees and other proceedings the claimant made the following entries on the journal for opening and adjourning court on the dates for which attendance is claimed: "Court met. Present, Hon. John W. Barr, sitting as circuit judge;" (or Judge Taft, or Judge Lurton, or whoever may have been the judge sending the order. Then follows the entry of the order or other proceedings of the .... court for that day) and, "It is now ordered that court stand adjourned until ....." The date to which adjournment was had was left blank, and when another such order, decree, or other proceeding was received to be entered said blank was filled by entering therein the date on which the same was received, and another entry, similar to the above, opening and adjourning the court to a blank date was made. The record containing the entries of the opening and adjourning of court, the certified presence of the judge, and the orders, decrees and other proceedings of the court was afterwards signed by the judge sending such orders, decrees and other proceedings to be entered as the record of the court for the days on which the same were respectively entered. The exhibits, A, B and C, attached to and made a part of these findings, are illustrative copies of the record of the court upon such days.

The nature and character of business transacted on the days on which court was opened and adjourned, as aforesaid, is best shown by the following statement of the subject-matter of said orders, decrees and other proceedings entered as aforesaid on the days actually claimed for:

Entry of order granting additional time to plead, 4 days.

Entry of order directing drawing of jury by jury commissioners, 18 days.

Entry of order granting restraining order, 5 days.

Entering orders disposing of sundry demurrers and motions, 21 days.

Entry of orders granting rule, 10 days.

Entry of orders granting application for writ of certiorari, 4 days.

Entry of orders granting petition for witnesses on behalf of the defendant at the cost of the United States, 7 days.

Entry of orders approving report of receivers, authorizing compromise by receiver, instructions issued to receiver, and various other orders pertaining to the appointment and conduct of receivers, 33 days.

Entry of orders and decrees finally disposing of cases, 17 days.

Sundry entries of orders granting writs of possession, approving bond of clerk of court, granting leave to withdraw exhibits, granting leave to file intervening petition, ordering sale of property, confirming sale of property, determining the priorities of liens, continuing cases, and granting appeals, 80 days.

III.

Claimant made his account for said services as attendance on court when the same was opened and adjourned by order of the judge and while the same was actually in session and business actually transacted, which was verified and presented to the United States court for approval in the presence of the district attorney, and orders approving the same as being just and according to law were entered of record. Said accounts were then presented to the accounting officers of the Treasury Department for payment, and payment of fees as per diems in Finding IV was refused.

IV.

Item 1.—Per diems for attendance on court on the days on which said orders, decrees and other proceedings were entered, 199 days, at $5.00 per day..... $995.00

V.

Charges for similar services have been made by the claimant in every account rendered since 1882, and were always allowed

and paid by the accounting officers of the Treasury up to June 30, 1893.

CONCLUSION OF LAW.

Upon the foregoing findings of fact a majority of the court decides, as a conclusion of law, that the claimant is entitled to recover the sum of nine hundred and ninety-five dollars ($995.00).

BRIEF OF ARGUMENT.

Counsel for appellant assign error in the 2d, 3d and 4th findings of fact, but concede the 5th finding of fact, the legal effect of which is later considered herein.

It will thus be seen from the above findings of fact that the court was opened by orders of the judge and in actual session; that the appellee as clerk of said court was in actual attendance on said court each and every day claimed, and that judicial business was actually transacted on said days.

These facts, established by the record, clearly entitle the clerk to his per diems for attendance under section 828, Revised Statutes, and the provision in the act of March 3, 1887, 24 Stats., 541, which reads:

"Nor shall any part of any money appropriated be used in payment of a per diem compensation to any attorney, clerk, or marshal for attendance in court, except for days when the court is opened by the judge for business or business is actually transacted in court, and when they attend under sections 583, 584, 671, 672 and 2013 of the Revised Statutes, which fact shall be certified in the approval of their accounts."

The record shows that this provision has been fully complied with. The court was opened by orders of the judge, judicial business was transacted, and the clerk was in actual attendance on the court.

The record also shows in the 3d finding of fact that the appellee made up his accounts for said services as attendance on court when the same was opened and adjourned by order

of the judge and while the same was actually in session and business actually transacted, which were verified and presented to the United States court for approval in the presence of the district attorney, and orders approving the same as being just according to law were entered of record.

The record further shows in the 5th finding of fact that charges for similar services have been made by the claimant in every account rendered since 1882, and were always allowed and paid by the accounting officers of the Treasury up to June 30, 1893, a period of over ten years.

From this record it follows, as a legal sequence, that the appellee is by law entitled to his per diems, and the approval of the court is *prima facie* evidence of the correctness of the items of said accounts, and, in the absence of *clear* and *unequivocal* proof of mistake on the part of the court, is conclusive.

U. S. *vs.* Jones, 134 U. S., 483.
U. S. *vs.* King, 147 U. S., 681, par. 2.
Jones *vs.* U. S., 21 Ct. Cls., 1.
Butler *vs.* U. S., 87 Fed. Rep., 655.

Counsel for appellant, however, in their assignment of errors and brief, endeavor to set aside this *prima facie* character of the approval of court and to show that the court made a mistake in approving the appellee's accounts by raising an objection, which is set forth in their brief on page 5:

"The court at Covington could not have been opened by the judge on the days claimed, because there was no judge present. No business—that is, judicial business—was transacted on said days, because none could be in the absence of the judge; there was no court open."

And, to sustain said objection, cite sections 583, 584, 671, 672 and the provision of the act of March 3, 1887, *supra*.

As a matter of fact, the answer to this objection is found in the findings of fact (R., p. 4), as follows:

"The record containing the entries of the opening and ad-

journing of court, the certified presence of the judge, and the orders, decrees and other proceedings of the court was afterwards signed by the judge sending such orders, decrees and other proceedings to be entered as the record of the court for the days on which the same were respectively entered."

The judges signing this record were Hon. John W. Barr, sitting as circuit judge; Hon. William H. Taft, circuit judge, and Hon. Horace H. Lurton, circuit judge, and it must be evident that these eminent judges would not have signed the record of the court's proceedings had they not been satisfied that the court was open and judicial business transacted.

Sections 583, 548, 671 and 672, R. S., have no application here, for the attendance was not on the court at the commencement or opening of any regular, adjourned or special term or session of the court, but during the regular session or term under sections 574 and 638, Revised Statutes.

While the record shows (R., pp. 5, 6, Exh. A, B, C) that the judges of the court were present on each day the court was opened, the findings of fact show that they were not personally present, but that the court was opened by their orders and the journal proceedings were afterwards signed by them *nunc pro tunc*

By reason of this fact counsel for appellant attack the right of the court to open and to transact any judicial business. But this contention has been squarely overruled.

In the Pitman case, 147 U. S., 671, where the same legal principle was involved, this court, speaking through Justice Brown, announced the law of the case in clear and conclusive language. He said:

"After the term of a court has been regularly opened upon the day provided by law, the question how long it shall remain open, to what day it shall be adjourned, and whether and how often it shall be opened for incidental business after the regular business of the term has been concluded, is a matter which rests in the discretion of the presiding judge. It is presumed that he will act in this particular in what he

conceives to be the interest of the public, and that he will put the Government to no unnecessary expense. It is clearly the duty of the officers of the court to be present at the adjourned day, and to obey the written order of the judge with respect to any further adjournment, and there is no reason why they should not receive their per diem therefor as if the judge were actually present." * * *

"We think the court should be deemed 'actually in session,' within the meaning of the law, not only when the judge is present in person, but when, in obedience to an order of the judge directing its adjournment to a certain day, the officers are present upon that day, and the journal is opened by the clerk, and the court is adjourned to another day by further direction of the judge. That this was the construction placed upon these sections by Congress is evident by the civil appropriation act of March 3, 1887, 24 Stats., 509, 541."

This interpretation of the law was subsequently followed by the circuit court of appeals in U. S. *vs.* Aldrich, 58 Fed. Rep., 688.

This same question has been learnedly treated by District Judge Baker and decided in favor of the claimant. (Butler *vs.* U. S., 87 Fed. Rep., 655.)

A most significant fact bearing on this appeal is that the appellee recovered judgment in the Court of Claims in a former suit involving similar facts and law, and, as no appeal was taken by the Attorney General, the judgment was paid. (Finnell *vs.* U. S., 32 Ct. Cls., 634.)

As the findings of fact were not printed by that court, a certified copy is here inserted for the information of this court. (Appendix A.)

EFFECT OF THE COURT'S ORDER.

The record conclusively shows that the court was opened by orders of the various judges, and, in obedience to said orders, the clerk was in attendance on said court each and every day claimed.

In the Van Duzee case, 140 U. S., 118, this court held:

"When the clerk performs a service in obedience to an order of the court, he is as much entitled to compensation as if he were able to put his finger upon a particular clause of a statute authorizing compensation for such services."

EFFECT OF LONG-CONTINUED PRACTICE OF THE COURT AND DEPARTMENT.

The practice of the court in this district, as shown by this record, has existed for over ten years, and has received the approval of the judges and district attorney. It further shows that the Treasury Department and Department of Justice have acquiesced in said practice for the same period, without exception, by paying the clerk his per diems for said attendance.

In considering a similar question of practice, this court, in the McDermott case, 140 U. S., 151, held:

"The local practice of Kentucky, as well as the almost universal practice of commissioners to draw these complaints themselves, is ample justification for this charge. It appears to have been the practice of the Department of Justice for the past twenty years to allow these as proper charges for drawing complaints, and if there were any doubt as to the propriety of their allowance, such doubt, in view of this long-continued practice, should be resolved against the Government."

The same principle is sustained in—

U. S. *vs.* Taylor, 147 U. S., 697, par. 5.
U. S. *vs.* Kurtz, 164 U. S., 53, par. 4.
U. S. *vs.* Dundy, 76 Fed. Rep., 357.

The power of the judges to open and adjourn their courts and transact judicial business cannot be attacked in this appeal by denying the clerk his per diems for attendance.

In the Jones case, 147 U. S., 675, this court held:

"The account in question is clearly within this section. Supposing it, however, to be a question of doubt, if the court assumed jurisdiction to make such order, and the clerk obeyed

it by entering it upon the journal, he is entitled to his fee therefor, irrespective of the necessity for such order being made. In fact, he would be guilty of contempt in refusing to make such entry. The Government cannot in this collateral proceeding attack the power of the court to make this order."

In the Payne case, 147 U. S., 689, this court also held:

"While a writ of *alias fi. fa.* is ordinarily issued upon a simple præcipe, it is perfectly competent for the district attorney to apply to the court for an order for that purpose, and, if such order be made, the clerk is clearly bound to enter it, and is entitled to his fee therefor, whether such order be necessary or not, or, indeed, whether the court had any right to enter it or not. The propriety of such an order cannot be tested upon the application of the clerk for his fee for entering it."

Upon the whole record herein, it is submitted that no error exists, and that the appeal should be dismissed.

CHARLES C. LANCASTER,
Counsel for Appellee.

APPENDIX A.

Court of Claims.

JOSEPH C. FINNELL
vs.
THE UNITED STATES. } No. 18,693.

Findings of Fact.

Filed February 18, 1897. J. R.

This case having been heard by the Court of Claims, the Court, upon the evidence, finds the facts to be as follows:

I.

The claimant, Joseph C. Finnell, was a Clerk of the District and Circuit Courts of the United States for the District of Kentucky from January 1, 1892, to June 30, 1894, duly qualified and acting.

II.

During said period he was in attendance on court when court was opened and adjourned by orders of the judges and business actually transacted, 164 days, at $5.00 per day. The journal shows the following entries for opening and adjourning court on the days for which attendance is claimed: "Court met. Present, Hon. John W. Barr, sitting as circuit judge (or whoever may have been the acting judge);" and "it is now ordered that court stand adjourned until the .... day of ...., 189.." on which day the court met pursuant to said order. But the judge was not personally present in court on those days. The exhibits, A, B and C, attached to these findings, are illustrative copies of the record of the court on such days.

III.

He made up his accounts for said attendance, duly verified, and presented the same to the United States court for approval in the presence of the district attorney, and orders

approving the same as being just and according to law were entered of record. Said accounts were then presented to the accounting officers of the Treasury Department for payment, and payment of per diems in Finding IV was refused.

IV.

Item 1.—For attendance on court when court was opened and adjourned by orders of the judges and business actually transacted, 164 days, at $5.00 per day $820.00

V.

In the settlement of accounts from January 1, 1892, to June 30, 1893, the accounting officers allowed 105 per diems aforesaid, at $5.00 per day, amounting to $525, and closed the accounts. Subsequently, in the adjustment of accounts from July 1, 1893, to December 31, 1893, the accounting officers deducted an amount of $525, otherwise legal, as a set-off for said 105 per diems heretofore made and allowed, and recharged and disallowed the same in these accounts.

VI.

The court was actually opened and adjourned by orders of the judge for the transaction of business, and business was actually transacted, the number of days charged in said accounts, and the clerk was in actual attendance on the court each and every day claimed, in accordance with the practice in this district.

VII.

The character of the work done on the days claimed was such as is usually transacted in court, such as making an entry on the minutes each day that the court was opened and adjourned by orders of the judge, the appointment of receivers, granting injunctions, issuing restraining orders, ordering attachments for contempt, extending time for reports and pleadings, and making orders and decrees in various cases heard and decided. The proceedings of each day were witnessed

on the journal by the signature of the presiding judge at the time.

Under the practice of the Federal courts in Kentucky, the equity side of the court is always open for the transaction of business, and on such days as business is actually transacted court is opened and the necessary entries made upon the journal. This practice began with and has uninterruptedly continued since the establishment of the courts in Kentucky. The duties of the clerk are identical with those rendered by him at regular terms, with a jury in attendance.

VIII.

Charges for similar services have been made by the claimant in every account rendered since 1882, and were always allowed and paid for the entire period from 1882 to June 30, 1895, except as shown in this case.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is entitled to recover judgment in the sum of eight hundred and twenty dollars ($820.00).

EXHIBIT "A."

United States Circuit Court, District of Kentucky.

December term, Tuesday, May 2nd, A. D. 1893.

Court met. Present: Hon. John W. Barr, sitting as circuit judge.

H. P. LLOYD, Trustee, etc., *vs.* ADAM WAGNER ET ALS. } 1720.

For good cause shown and by consent of all parties hereto, it is ordered that this action be, and the same is hereby, dismissed as to H. A. Shriver and Agnes Wiedman, executrix,

but without prejudice to the rights of complainants to proceed against the other defendants herein; and it is adjudged that the said Shriver and Agnes Wiedman, executrix, shall pay all the costs of this case to date, including an allowance to the commissioner, R. P. Ernst, of $1,000.00, out of which he shall pay all expenses of said reference, allowed by the order of reference herein, and which may have been incurred by him, and that the said Shriver and said Wiedman pay an allowance to the attorneys for complainants in such sum as has been agreed upon by counsel for said sureties and said complainants, which Shriver and Wiedman having done, they are now adjudged to be discharged of all liability growing out of any of the matters and things involved in this action, and for all costs and allowances herein.

And this cause is continued for further proceedings.

It is now ordered that court stand adjourned until court in course.

JNO. W. BARR.

EXHIBIT "B."

United States Circuit Court, District of Kentucky.

May term, Saturday, July 1st, A. D. 1893.

Court met. Present: Hon. Wm. H. Taft, judge.

J. O. COLE
vs.
C. CRANE ET ALS. } 1842.

Upon application to the court, it is hereby ordered that a rule issue against T. R. Brown and J. O. Kelly, returnable Saturday, July 8th, 1893, at ten o'clock a. m., requiring them and each of them to show cause why they and each of them should not be attached for contempt for attaching or causing to be attached and detained one horse, called "No Clothes;" one horse, called "Black Frank;" a set of harness and one buggy and rigging, in the custody and control of C. W. Baker, as receiver of this court herein.

It is now ordered that court stand adjourned until Monday, July 3rd, A. D. 1893.

WM. H. TAFT.

EXHIBIT "C."

United States Circuit Court, District of Kentucky.

May term, Tuesday, August 1st, A. D. 1893.

Court met. Present: Hon. John W. Barr, sitting as circuit judge.

M. SCHAMBERG
vs. } 1846.
JAS. H. & J. B. LESLIE.

This cause being heard upon the motion of complainant for a restraining order, the complainant tendered and asked leave to file an amended bill of complaint, which is granted, and said amended bill is ordered to be filed.

M. SCHAMBERG
vs.
JAS. H. & J. B. LESLIE.

This cause being heard upon the bill and amended bill and the motion of complainant for a restraining order, upon notice to defendants, given July 28, 1893, it is ordered that the defendants, James Henry Leslie and John B. Leslie, and their agents and servants and all other persons, are enjoined and restrained until further order of the court from proceeding further against the complainant or his property under a certain judgment rendered by this court at its June term, held at the city of Frankfort, in a certain action then and there depending, wherein James H. Leslie, the defendant herein, was plaintiff and complainant herein, M. Schamberg, was defendant, said judgment being for the sum of forty-six hundred and sixty-seven dollars ($4,667.00), with interest. But this order shall not issue until bond shall be executed by the complainant, with surety, to be approved by the clerk of the court, at Covington, in the sum of eight thousand dollars, conditioned to pay the damages and all injury sustained by the defendants by reason of the injunction, if the order therefor shall have been wrongfully obtained or said injunction be dissolved.

It is now ordered that court stand adjourned until Saturday, August 19, 1893.

JNO. W. BARR.

Judgment of the Court.

JOSEPH C. FINNELL
vs.
THE UNITED STATES. } No. 18,693.

At a Court of Claims held in the city of Washington on the 18th day of February, A. D. 1897, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge and decree that the claimant, Joseph C. Finnel, do have and recover of and from the United States the sum of eight hundred and twenty dollars ($820.00).

BY THE COURT.

Court of Claims.

WASHINGTON, D. C.

I, John Randolph, assistant clerk of the Court of Claims, certify that the foregoing are true transcripts of the findings of fact and conclusion of law filed by the court and of the judgment of the court in the above-entitled cause as filed and entered on the 18th day of February, A. D. 1897.

Test this 8th day of March, A. D. 1902.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.